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In the Supreme Court of the United States

OCTOBER TERM, 1991

PATRICIA SMITH
Petitioner,

v.

JAMES FRELAND, et al
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether a city and its police chief can be held liable for damages under 42 U.S.C. Section 1983 arising from the fatal shooting of an offender by a patrolman where the city has in place an adequate training program and constitutionally valid rules, there is no pattern of prior incidents of the use of excessive force and following the incident the chief conducts an adequate investigation.

2. Whether Ohio Revised Code Section 2744.02 and 2744.03 provide a city and its police chief with immunity from a state wrongful death claim arising from the fatal shooting of an offender by one of the city's officers.

TABLE OF CONTENTS

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW I

TABLE OF AUTHORITIES V

COUNTER STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

A. A city and its police chief are not liable for damages under 42 U.S.C. Section 1983 resulting from the shooting of a fleeing offender by a police officer where the city's training program, policies and supervision are constitutionally adequate and the plaintiff's claim of ratification is based solely on the fact that the chief, after a complete investigation, concluded that discipline of the officer was not justified.

Authorities:

Monell v. New York City, 436 US 658 (1978) 6

Oklahoma City v. Tuttle, 471 US 808 (1985) 6

City of Canton v. Harris, 109 S.Ct. 1197 (1989) 7

Hays v. JeffersonCounty, 668 F.2d 869 (6th Cir. 1982) 7

Batista v. Rodriguez, 702 F. 2d 393 (2d Cir. 1983) 8

Languirand v. Hayden, 717 F. 2d 220 (5th Cir. 1983) 9

Rodriguez v. Avita, 871 F. 2d 552 (5th Cir. 1989) 9

Patzner v. Burkett, 779 F. 2d 1363 (8th Cir. 1985) 9

McClelland v. Fecteau, 610 F. 2d 693 (10th Cir. 1979) 9

Wellington v. Daniels, 717 F. 2d 932 (4th Cir. 1986) 10

Hinshaw v. Doffer, 785 F. 2d 1260 (5th Cir. 1986) 10

Owens v. Haas, 601 F. 2d 1242 (2d Cir. 1979) 10

Pembauer v. Cincinnati, 475 US 469 (1986) 11

The City of St. Louis v. Praprotnik, 108 S.Ct. 915 (1988) 12

Grandstaff v. City of Borger, 767 F. 2d 161 (5th Cir. 1985) 12

Bordanaro v. McLeod, 871 F. 2d 1151 (1st Cir. 1989) 14

Tennessee v. Garner, 471 US 1 (1985) 16

Kibbe v. Springfield, 777 F. 2d 801 (1st Cir. 1985) (writ dismissed 107 S. Ct. 1114, 1987) 20

Hammond v. County of Madera, 859 F. 2d 797 (9th Cir. 1988) 20

Melton v. Oklahoma City, 879 F. 2d 706 (10th Cir. 1989) 21

Marchese v. Lucas, 758 F. 2d 181 (6th Cir. 1985) 21,22

Walker v. Norris, 917 F. 2d 1449 (6th Cir. 1990) 21

B. Ohio Revised Code Sections 2744.02 and 2744.03 provide a city and its police chief with absolute immunity from state law wrongful death and survivorship claims arising from the shooting of a fleeing offender by a member of the police force.

Authorities:

Urseth v. Dayton, 653 F. Supp. 1070 (S.D. Ohio 1986) 23

E.J. v. Hamilton County, 707 F. Supp. 314 (S.D. Ohio 1989) 24

Wallin v. Cincinnati Eye Bank, et al, 733 F. Supp. 1152 (S.D. Ohio W.D. 1990) 25

Rahn v. City of Whitehall, 62 Ohio App. 3d 62 (Franklin Co. 1989) 25

St. Clair Corporation v. Cleveland, 49 Ohio St. 3d 33 (1990) 26

Krause v. State of Ohio, 31 Ohio St. 2d 132 (1972) 26

Frazier v. Alum Crest, 48 Ohio App 2d 283 (1976) 27

C. Where a plaintiff petitions for a Writ of Certiorari to review a judgment in favor of all defendants but argues error only as to one defendant, certiorari, if granted, should be limited to that defendant.

CONCLUSION 27

TABLE OF AUTHORITIES

Cases

Batista v. Rodriguez, 702 F. 2d 393 (2d Cir.1983) ... 8

Bordanaro v. McLeod, 871 F. 2d 1151 (1st Cir. 1989) 14

City of Canton v. Harris, 109 S.Ct. 1197 (1989) 7

E.J. v. Hamilton County, 707 F. Supp. 314 (S.D. Ohio 1989) 24

Frazier v. Alum Crest, 48 Ohio App 2d 283 (1976) 27

Grandstaff v. City of Borger, 767 F. 2d 161 (5th Cir. 1985) 12

Hammond v. County of Madera, 859 F. 2d 797 (9th Cir. 1988) 20

Hays v. JeffersonCounty, 668 F.2d 869 (6th Cir. 1982) 7

Hinshaw v. Doffer, 785 F. 2d 1260 (5th Cir. 1986) 10

Kibbe v. Springfield, 777 F. 2d 801 (1st Cir. 1985) (writ dismissed 107 S. Ct. 1114, 1987) 20

Krause v. State of Ohio, 31 Ohio St. 2d 132 (1972) 26

Languirand v. Hayden, 717 F. 2d 220 (5th Cir. 1983) 9

Marchese v. Lucas, 758 F. 2d 181 (6th Cir. 1985) 21,22

McClelland v. Fecteau, 610 F. 2d 693 (10th Cir. 1979) 9

Melton v. Oklahoma City, 879 F. 2d 706 (10th Cir. 1989) 21

Monell v. New York City, 436 US 658 (1978) 6

Oklahoma City v. Tuttle, 471 US 808 (1985) 6

Owens v. Haas, 601 F. 2d 1242 (2d Cir.1979) 10

Patzner v. Burkett, 779 F. 2d 1363 (8th Cir.1985) ... 9

Pembauer v. Cincinnati, 475 US 469 (1986) 11

Rahn v. City of Whitehall, 62 Ohio App. 3d 62 (Franklin Co. 1989) 25

Rodriguez v. Avita, 871 F. 2d 552 (5th Cir.1989) 9

St. Clair Corporation v. Cleveland, 49 Ohio St. 3d 33 (1990) 26

Tennessee v. Garner, 471 US 1 (1985) 16

The City of St. Louis v. Praprotnik, 108 S.Ct. 915 (1988) 12

Urseth v. Dayton, 653 F. Supp. 1070 (S.D. Ohio 1986) 23

Walker v. Norris, 917 F. 2d 1449 (6th Cir. 1990) .. 21

Wallin v. Cincinnati Eye Bank, et al, 733 F. Supp. 1152 (S.D. Ohio W.D. 1990) 25

Wellington v. Daniels, 717 F. 2d 932 (4th Cir. 1986) 10

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COUNTER STATEMENT OF THE CASE

At 9:22 P.M. in the evening of October 31, 1988, Officer Peter Schulcz of the Springdale Ohio Police Department observed an automobile leaving an apartment complex in a reckless manner and nearly colliding with another vehicle. Schulcz gave chase in his police cruiser. The driver of the vehicle attempted to elude capture, driving at a high speed approximately three miles northward into the adjoining county. At this point Officer Janice Gordon of the Sharonville Police Department joined the chase.

The fleeing motorist then reversed his course, proceeding southbound into the City of Sharonville, driving off the road in order to by pass a road block which Officer Gordon had set up with her cruiser. Officer Schulcz ultimately cornered the suspect and his vehicle at the dead end of Woodbine Avenue in Sharonville. However, the subject backed up and went around the cruiser proceeding to the other side of the street. Officer Schulcz then maneuvered his cruiser so as to again block the subject's vehicle with the vehicles stopped front to front. Officer Schulcz then got out of his police cruiser and attempted to arrest the subject. At this point the subject drove forward toward the officer, striking the police car and driving through a fence. Officer Schulcz fired one shot killing the driver who was later identified as Plaintiff's decedent, Brent Robin Smith.

James Freland is the Chief of Police of the City of Springdale. Freland was not on duty that evening nor was he in any way involved in the pursuit or the shooting.

Officer Schulcz was hired by the City of Springdale on September 11, 1985. Before commencing work, he received his basic police training at the Norwood Police Academy. This basic training program was approved by the Ohio Peace Officer Training Council in accordance with the requirements of the Ohio Revised Code, Section 109.77. Thereafter Officer Schulcz received additional training all as detailed in Chief Freland's Affidavit. There were no complaints against Officer Schulcz alleging the use of excessive force prior to the shooting of Brent Smith.

The only incident involving the discharge of firearms by a Springdale police officer prior to the shooting of Smith occurred on September 2, 1981. A subject was shot and wounded when he attempted to escape during his arrest on a warrant for first degree murder.

The Springdale Police Department has an established system of performance evaluation review of its police personnel. Officer Schulcz received evaluations on

May 2, 1986, December 17, 1986 and December 28, 1987, and his performance was rated satisfactory on each review.

The Springdale Police Department has had in effect for a number of years a procedure for the processing and investigation of citizens' complaints regarding police actions. A regular printed form is provided. Witnesses are interviewed and there is an initial and final determination as to justification. Two such complaints have been filed and processed, one on August 7, 1986, and the other on September 28, 1988. Both are detailed in Freland's affidavit and neither was found to be justified.

Following the Smith shooting, Chief Freland made a complete investigation of the circumstances. This involved participation in the investigation conducted by the City of Sharonville. He also had photographs taken of the route of the chase and the scene of the shooting. An expert was retained in an attempt to calculate the relative positions of the Officer and Smith's vehicle at the time of the shooting. On January 10, 1989, Chief Freland issued his report finding that Officer Schulcz had acted reasonably and lawfully and that no disciplinary action was warranted. The matter had previously been submitted by the City of Sharonville to the Hamilton County Grand Jury, which ignored the case. All of the foregoing facts were established during discovery and with the exception of the precise details of the actual shooting, all were undisputed.

Patricia Smith filed suit in the U.S. District Court for the Southern District of Ohio individually and as administratrix of the estate of her son, Brent Robin Smith. The complaint sought compensatory and punitive damages from Officer Schulcz, Chief Freland and the City of Springdale under 42 U.S.C. Section 1983 and also under Ohio law. The allegations against the city and the Chief of Police were to the effect that pursuant to official policy, they had failed to properly train and supervise the police force and had created "an atmosphere of lawlessness" by encouraging the belief that acts of excessive force would be condoned.

The city and Chief Freland filed a joint motion for summary judgment asserting (1) that there was no basis for finding that the shooting of Smith resulted from an official policy of the city and (2) that the city and Chief Freland were immune from liability on the state law claims under Chapter 2744 of the Ohio Revised Code. In responding the plaintiff conceded that the city's training and policies were adequate. Plaintiff resisted the motion on the sole ground that chief had "ratified" the shooting by concluding, after investigation that no discipline was warranted.

Officer Schulcz also moved for summary judgment asserting qualified immunity based upon self defense. The District Court granted both motions finding that Smith's actions posed a significant threat of physical injury to others and that the shooting was justified. The Court of Appeals for the Sixth Circuit affirmed, essentially adopting the reasoning of the District Court.

SUMMARY OF THE ARGUMENT

I. Petitioner conceded that the city's training program was adequate and its written policy on use of force was constitutional. Discovery established that there were no prior incidents involving use of excessive force by members of the police force. The Chief of Police conducted a complete investigation of the matter and concluded that no disciplinary action was warranted. As a matter of law, it cannot be held that the shooting resulted from any official policy of the city.

II. Police Chief Freland and the City of Springdale are, under Ohio Statutory Law, immune from liability on state wrongful death and survivorship claims.

III. Since the petitioner has failed to question the judgment in favor of James Freland and the City of Springdale she has waived any error as to these parties. Certiorari should therefore not be granted as to their judgments.

ARGUMENT

I. A city and its police chief are not liable for damages under 42 U.S.C. Section 1983 resulting from the shooting of a fleeing offender by a police officer where the city's training program, policies and supervision are constitutionally adequate and the plaintiff's claim of ratification is based solely on the fact that the chief, after a complete investigation, concluded that discipline of the officer was not justified.

42 USC Section 1983 provides as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state...subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...."

Petitioner's claim is that her son was deprived of his right to "life, liberty and procedural and substantive due process under the Fourteenth Amendment; the right to be free from cruel and unusual punishment under the Eighth Amendment; and the right to be free from unreasonable seizures under the Fourth Amendment."

Petitioner attempted to state a claim against the chief and the city under the statute by alleging that:

> "The actions of Defendant Schulcz, previously described, in causing the death of Brent Robin Smith and Plaintiff's consequent injuries, were the direct and proximate result of gross negligence and deliberate indifference by the City of Springdale and Freland, which and who pursuant to official practice, policy, or custom of the City of

> Springdale, failed to properly and adequately train, instruct and supervise Springdale police officers, including Schulcz....Defendants created an atmosphere of lawlessness among the Springdale Police Department by encouraging the belief among police officers of that Department, including Schulcz, that acts of excessive force would be justified by their superiors and the City Administration."

Monell v. New York City, 436 US 658 (1978) held that municipalities are "persons" subject to damages liability under Section 1983 for violations of the Act committed by municipal officials. This Court however specifically held that municipal liability could not be premised merely upon respondeat superior. It was held that municipal liability could only be imposed for injuries inflicted pursuant to the municipality's "policy or custom."

Oklahoma City v. Tuttle, 471 US 808 (1985) held that while inadequate police training could be the subject of an official policy, such a policy could not be inferred from proof of a single incident of unreasonable force. This Court made it clear at page 823 that proof of such a "policy" would be a difficult hurdle:

> "In the first place, the word "policy" generally implies a course of action consciously chosen from among various alternatives; it is therefore difficult in one sense even to accept the submission that someone pursues a "policy" of "inadequate training" unless evidence be adduced which proves that the inadequacies resulted from conscious choice - that is, proof that the policy makers deliberately chose a training program which would prove inadequate."

After discovery it became obvious that no such proof was available in this case. Petitioner therefore conceded in the District Court that there was no basis for a "failure to train" claim. Springdale chose a training program which is approved by the Ohio Peace Officer Training Council as

required of every municipality under Ohio Revised Code Section 109.77. Being the statewide standard, it was impossible to conclude that Springdale has deliberately chosen an inadequate training program.

Tuttle was cited with approval in *City of Canton v. Harris*, 109 S.Ct. 1197 (1989). This Court stated at page 1204:

> "We hold today that the inadequacy of police training may serve as the basis for Section 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact."

The Sixth Circuit had previously held in *Hays v. Jefferson County*, 668 F.2d 869 (6th Cir. 1982) that:

> "Where, as here, the constitutional violation was not alleged to be part of a pattern of past misconduct, the supervisory official or a municipality may be held liable only where there is essentially a complete failure to train the police force, or training that is so reckless and grossly negligent that future police misconduct is almost inevitable,....or would properly be characterized as substantially certain to result."

In view of the fact that there is no evidence of a single prior incident of the excessive use of force it is obvious that the Petitioner has not met this standard.

In the district court respondents served Interrogatories upon the Petitioner requiring her to disclose the evidence supporting the allegations of the Complaint relating to these respondents. Petitioner's response was as follows:

> "Following the fatal shooting of Plaintiff's Decedent, as set forth in the Statement of Facts in the Complaint, the City of Springdale and Freland condoned and ratified the actions of Schulcz, who used unwarranted, unreasonable, excessive and

> deadly force in seizing the person of Brent Robin Smith, as representative of and consistent with the official policy and practice of the City of Springdale in connection with the pursuit of motor vehicles; the stop and apprehension of criminal suspects; and the use of deadly force. The ratification of this official policy includes but may not necessarily be limited to failure of the City or Freland to discipline or to restrain or to retrain Schulcz and/or by commending his actions."

Thus the Plaintiff is relying solely on evidence of Defendants' actions after the shooting incident. Unquestionably, this is inadequate as a matter of law. The identical theory was rejected in *Batista v. Rodriguez*, 702 F. 2d 393 (2d Cir.1983). In that case, as in the present case, plaintiffs relied solely on the fact that the City failed to discipline the officers involved following an arrest involving an unreasonable use of force.

Although this court in *Tuttle* held that a municipal policy could not be inferred from the occurrence of a single instance of excessive force, it did not precisely define the requirements for such a claim. However, virtually all of the circuits have required evidence of a pattern of similar incidents of police misconduct. Without notice of such a pattern of prior incidents, a municipality can not be said to have a "policy" of condoning such activity.

Languirand v. Hayden, 717 F. 2d 220 (5th Cir.1983), stated the rule as follows:

> "We conclude that if there is a cause of action under Section 1983 for failure to properly train a police officer whose negligent or grossly negligent performance of duty has injured a citizen, then such failure to train must constitute gross negligence amounting to conscious indifference, and that a municipality is not liable under Section 1983 for the negligence or gross negligence of its subordinate officials, including its Chief of Police,

> in failing to train the particular officer in question, in the absence of evidence at least of a pattern of similar incidents in which citizens were injured or endangered by intentional or negligent police misconduct and/or that serious incompetence or misbehavior was general or widespread throughout the police force."

Rodriguez v. Avita, 871 F. 2d 552 (5th Cir.1989), affirmed the granting of a Motion to Dismiss for failure to plead the existence of prior incidents.

Patzner v. Burkett, 779 F. 2d 1363 (8th Cir.1985), affirmed a Summary Judgment in favor of the County relying on the holding in *Tuttle*:

> "Further, absent a showing of prior misconduct, Burkett and Myerchin's behavior toward Patzner does not support an inference of notice to the County. The first isolated incident of misconduct by a subordinate employee generally is not enough to establish a policy or custom."

McClelland v. Fecteau, 610 F. 2d 693 (10th Cir. 1979), also held that prior notice of police misconduct was essential. The Court went on to note that there was abundant evidence of prior police misconduct which had been the subject of numerous newspaper articles and affidavits. A summary judgment in favor of the Police Chief was therefore reversed.

In *Wellington v. Daniels*, 717 F. 2d 932 (4th Cir.1983) the Court stated that:

> "Generally, a failure to supervise gives rise to Section 1983 liability, however, only in those situations in which there is a history of widespread abuse. Only then may knowledge be imputed to the supervisory personnel."

In *Hinshaw v. Doffer*, 785 F. 2d 1260 (5th Cir.1986), the Court reversed a judgment which had been entered against the police chief holding that there had been an inadequate showing of prior instances of misconduct by the individual police officer involved. While the Plaintiff had offered evidence of three incidents involving the same officer, the Court found that the chief had properly investigated all three instances and had reprimanded the officer on the only incident found to involve improper conduct.

Owens v. Haas, 601 F. 2d 1242 (2d Cir.1979), held that an official policy could be inferred without evidence of prior misconduct but the holding is limited to the peculiar facts of the case. This was an action by an inmate of a prison who had been beaten by seven prison guards. The testimony of one of the guards tended to indicate that the guards were following an accepted practice in dealing with a stubborn prisoner. The Court felt that because the incident occurred within the confines of a prison that it was likely that the prison officials were aware of the practice. In view of the holding in *Tuttle* this decision is clearly not applicable as against a municipality and its police chief.

After conceding the training claim, petitioner persisted with the untenable argument that the City of Springdale had in place a de facto policy of condoning the use of excessive force. Petitioner made this assertion while at the same time conceding that the city's written policy regarding the use of deadly force is constitutionally valid. The sole basis for this untenable argument is that Chief Freland, following an extensive investigation, concluded that Officer Schulcz's actions were justified. There is not a single reported decision holding that a de facto policy may be inferred from the sole fact that the city and its Police Chief determined, after investigation, that no disciplinary action was warranted. As will be demonstrated below, none of the cases cited by petitioner makes such a holding.

Petitioner cited *Pembauer v. Cincinnati*, 475 US 469 (1986) for the proposition that a single decision by the appropriate policy maker can constitute a policy. It was

unclear from plaintiff's argument whether she was pointing to the decision of Officer Schulcz to shoot Smith or the decision of Freland not to discipline Schulcz. In either event the facts of Pembauer completely distinguish it from this case. In Pembauer police officers broke down the door of a doctors office in an effort to execute an arrest warrant. This was done on the specific orders of the county prosecutor to "go in and get them". Under state law, a county prosecutor is a policy maker and thus the single decision could be the basis of liability. In that case the policy maker specifically ordered an unconstitutional act. This court did not hold nor has any other court held that an unconstitutional de facto policy could be inferred solely from the actions of the policy makers taken after the act in question.

Petitioner also cited *The City of St. Louis v. Praprotnik*, 108 S. Ct. 915 (1988) but that case provides no support whatsoever for petitioner's argument. Praprotnik was a city employee who had been transferred and then laid off by his supervisor allegedly in retaliation for his appealing a prior employment decision. A judgment against the city was reversed by this court which held that the Mayor and City Council were the policy makers and not the supervisor who took the unconstitutional action. The court further held that the fact that such decisions were given substantial deference by the Civil Service Commission did not indicate that there had been a delegation of policy making authority. Due to the factual situation is doubtful whether the case has any application whatsoever to the present case.

Petitioner asserted that the facts of the present case were similar with the facts involved in *Grandstaff v. City of Borger*, 767 F. 2d 161 (5th Cir. 1985). In Grandstaff the entire night shift of the Borger Police Department, consisting of six officers, pursued a wanted felon onto the property of a private cattle ranch. During the pursuit on the highway the police had fired numerous shots at the

fleeing vehicle. The fugitive abandoned his truck and fled on foot amid a fusillade of more police gunfire. One of the bullets struck the home of Grandstaff who was the ranch foreman. Grandstaff was awakened by the noise and approached the police officers in his pickup truck. Although the policemen were aware that the fugitive had fled on foot all opened fire on Grandstaff's pickup truck, fatally wounding him as he got out of the truck. It was never established that the fugitive had fired upon the officers or that he was even armed. The police log was in evidence indicating that the entire event encompassed approximately 24 minutes and that the Chief of Police had been advised from the beginning of the officers actions. Although there was no evidence of prior misconduct of members of the Borger Police Force, there was extensive evidence from which the jury found:

> "The City of Borger was grossly negligent in failing to properly train its police officers and that serious incompetence or misbehavior was general or widespread throughout the City of Borger Police Force." (Grandstaff Pg. 170)

In Grandstaff when the plaintiffs completed their case and rested, the city rested without calling any witnesses and the Chief of Police did not testify. Thus, the plaintiff's evidence of lack of training was totally unrefuted. Plaintiff can hardly rely upon Grandstaff since it is conceded that there is no basis whatsoever for a claim that the city and Chief Freland failed to train the police force.

The facts in *Bordanaro v. McLeod*, 871 F. 2d 1151 (1st Cir 1989) are even more outrageous than those involved in Grandstaff and even farther removed from the fact situation in the case at bar. McLeod was an off duty policeman of the City of Everett, Massachusetts. On the evening in question he went with his girlfriend to a bar located in a motel in the adjoining City of Chelsea. He soon became involved in a brawl with one of the patrons who won the fight and threw McLeod out of the bar. McLeod

thereupon called his buddies on the Everett Police Department for help. With the knowledge of the lieutenant in charge, the entire night shift of the Everett Department proceeded out of their jurisdiction to the motel in Chelsea to avenge the beating of McLeod. Upon the approach of the police, McLeod's adversary and twelve other patrons of the bar sought refuge in a motel room where they locked the door. The Everett Policemen broke down the outer glass doors of the motel which had been locked due to the lateness of the hour. The owner of the motel and the manager offered to unlock the guest room with a pass key but the officers proceeded to assault and beat both of them. The police were armed with nightsticks, clubs, bats, tire irons, a fire axe and their service revolvers. They drilled a hole in the room door through which they sprayed mace. Thereafter one of the officers fired two shots through the door. When they finally broke the door down they proceeded to beat all of the occupants into an unconscious state. All were severely injured. Plaintiff's decedent, Vincent Bordanaro died as a result of the beating.

In *Bordanaro* one of the officers involved testified that the Everett Police Department had a long standing rule authorizing the breaking down of doors without a warrant when arresting a felon. The department even provided a sledge hammer for this purpose. The particular officer also testified that he had been involved in either twenty or thirty or fifty or sixty situations involving door break downs during his twenty-four years experience with the department. There was also affirmative evidence of a total failure to train the police department. The department was operating under a set of rules and regulations promulgated in 1951 and the plaintiff's expert testified that these regulations were deficient in almost every respect. There had been specific warnings to the Mayor and Chief of Police from various supervisory personnel in the police department as to the need for training. There was also an almost complete failure to check the background of prospective police officers. Although a local ordinance

required psychological evaluations, they were often not performed. There was also evidence of prior misconduct on the part of the department and evidence that these complaints were seldom investigated. The incident involved in the case was not investigated at all by the city for more than a year after the incident and then only long after the officers involved had been indicted.

In sharp contrast the evidence in the present case indicates that the City of Springdale has in place and has followed a regular system of investigating complaints of police misconduct and it also appears that there have been few such complaints. (Freland affidavit) In recruiting policemen, complete background checks are conducted including a psychological evaluation. (Osborn deposition pp. 39, 40) As the report of Chief Freland indicates, (Freland deposition Exh. 8) an investigation of the incident was immediately launched with all details being carefully examined. The police department rules are admittedly adequate. In fact General Order No. 46 (Freland affidavit) covering use of force, was distributed by the chief through a memo citing *Tennessee v. Garner*, 471 US 1 (1985).

The shooting of Brent Smith did not result from the actions of the entire night shift of the Springdale Police Department. Instead it resulted from the decision of one officer acting under extreme provocation in which he had at best a split second in which to make the decision to fire. Petitioner may disagree with Chief Freland's conclusion but she can find no case law holding that the chief's decision supports an inference of a de facto unconstitutional practice within the Springdale Police Department.

Petitioner equates Chief Freland's decision in this case with a failure to discipline. That is simply not the fact. While she naturally picks out the bits and pieces of evidence which would support the theory that Brent Smith was shot while only trying to escape, there is also evidence that he was trying to run over Officer Schulcz. The

shooting occurred directly in front of the home of Bob Maley who observed the incident through his front window. At 9:40 P.M. on the night of the shooting Maley gave a written statement (Maley deposition Exh. 1) in which he stated that:

> "Suspect backed up, went around the police car, tried to run down policeman."

Some fourteen months later, in January 1990, petitioner sent a private detective, one Gary Simpson, to visit Mr. Maley. (Maley deposition pp. 54, 55) At Simpson's urging, Maley retracted his conclusion as to Smith's intent. However, he did not retract his factual statement that Officer Schulcz was in front of the car when he took aim and that Smith was driving his car toward the officer. At page 26 of his deposition he testified as follows:

Q. Did you see the officer move at any time or take any steps to get out of the way of the Smith car?

A. Yes.

Q. Did it appear to you that he was trying to get out of the way of the Smith car?

A. That's what it appeared to me."

On page 56 he explained the effect of the change in his statement:

Q. Exhibit 1 is a statement that you gave on the night of the incident; is that right?

A. Yes, Exhibit 1 is. You know, like I said before, trying to run down policemen is something that when I looked at that I thought, Gee, I must be pretty smart or something if I know what the guy in the car is thinking or even assuming. I was just assuming, I guess, that he seen this policeman. I don't know, maybe he did or maybe he didn't, that's why I amended it.

Q. Did any police officer--

A. I'm not saying he didn't try to run down this policeman, all I'm saying is, I don't know if he even seen the policeman. I have no idea how to tell he seen him, I didn't see him wave to him or anything."

Again at page 72 of his deposition Maley testified:

Q. When you said in your second statement which is Exhibit No. 3, "I cannot honestly say suspect deliberately tried to run down policeman." I think you've indicated that you don't know what his intention was, is that what your saying?

A. That's all I'm saying is that I don't know what his intentions were. I'm not saying he didn't deliberately try to run down that policeman."

At page 77 Maley graphically described Schulcz's predicament:

Q. How long did he have to make this decision whether or not to shoot?

A. A split second, I guess."

Maley's version of the events completely corroborated Schulcz's testimony and it was also consistent with the analysis done by the engineer, Dr. Ronald Huston.

The testimony of the Beattys and the Laudermilks would tend to indicate that Officer Schulcz was not in danger from Smith's moving vehicle. However, it must be remembered that the Laudermilks live across the street from the incident and most of their view was blocked by the police cruiser. The Beattys live farther up the street from Maley and they were viewing the incident from a greater distance and a different angle than Maley. It is thus not difficult to understand why the chief would accept Maley's

initial statement even though it was not consistent with the version of the Beattys or the Laudermilks. In view of these facts and the extensive consideration which Chief Freland gave to the incident the conclusion formed by petitioner's expert Dr. Kirkham, at paragraph 9 of his affidavit is totally unsupported. In fact, this particular paragraph comes closer to being a legal conclusion than an expert opinion of fact. Chief Freland's obligation was to investigate the matter and give fair consideration to all of the evidence. While others might reach a different conclusion it is obvious that there were objective facts to support Chief Freland's conclusion that no disciplinary action was warranted. No reported decision has ever second guessed a police chief's good faith conclusion where it was based upon an adequate investigation.

Petitioner also argued that the city can be held liable because it ratified the shooting of Brent Smith by finding that disciplinary action was not warranted. The simple answer to this argument is that the ratification theory can have no application to cases claiming excessive use of force by police officers. The ratification theory can only apply to a situation where the unconstitutional action is approved and confirmed by a policy maker who has the power to reverse or repeal the act or decision. When Officer Schulcz pulled the trigger, any alleged violation of Smith's constitutional rights was complete and no power on earth could ratify, confirm or reverse the action. The term "ratify" is usually used in situations where some particular action of a subordinate, such as an ambassador signing a treaty, is subject to ratification by a higher authority such as the senate. In that case the action is not complete nor valid until the ratification takes place. No one can validate a shooting by ratification nor is the disciplinary action of the officer involved in anyway analogous. Petitioner's argument is somewhat similar to the saying that a jury has ratified a murder by finding the defendant not guilty.

Kibbe v. Springfield, 777 F. 2d 801 (1st Cir. 1985) (writ dismissed 107 S. Ct. 1114, 1987) rejected the ratification theory in a police shooting situation, page 809, note 7:

> "The [trial] court suggested that the city had ratified defendant Perry's action by clearing him and finding that he had acted in accordance with the police department's policies. We are unconvinced that a failure to discipline Perry or other officers amounts to the sort of ratification from which a jury properly could infer municipal policy."

The cases cited by petitioner illustrate and confirm the above analysis. *Hammond v. County of Madera*, 859 F. 2d 797 (9th Cir. 1988) was a situation where a county official improperly took Indian lands for road purposes. Under state law, the County Board of Supervisors were required to approve the taking before it became effective which they ultimately did. Thus the county, which could have refused to approve the taking and return the lands, instead ratified it and accepted the property.

Melton v. Oklahoma City, 879 F. 2d 706 (10th Cir. 1989) involved a police officer who was allegedly fired for testifying on behalf of a criminal defendant. The decision to fire the officer was approved by the city manager who was the final policy making authority over employment decisions. His approval was considered a ratification since he had the power to disapprove and thereby reverse and avoid the unconstitutional firing.

Although both *Marchese v. Lucas*, 758 F. 2d 181 (6th Cir. 1985) and *Walker v. Norris*, 917 F. 2d 1449 (6th Cir. 1990) both discuss ratification, those cases actually stand for the proposition that the failure to investigate is evidence of a policy of condoning excessive use of force by police officers.

In *Walker* an inmate of a state prison was fatally stabbed by a fellow inmate in the presence of two guards who had ample opportunity to prevent the attack. The Court of Appels affirmed a judgment against the guards but upheld a directed verdict in favor of the state corrections

commissioner and the warden. In refusing to impose ratification liability the court noted at p. 1457:

> "Here, the prison's internal affairs division investigated the stabbing and prepared an incident report, which defendant Dalton reviewed and discussed with the associate warden before signing it and submitting it to district attorney and disciplinary board."

Even though no disciplinary action was taken against the guards the court held there was no basis for supervisory liability since the incident was investigated. In the present case the chief conducted a complete investigation and reached a conclusion (concurred in by a U.S. District Court Judge and the Court of Appeals) based upon objective evidence, that no disciplinary action was warranted under these circumstances. There simply is no basis for concluding that the city or the chief has a policy of condoning the use of excessive force.

Marchese v. Lucas, 758 F. 2d 181 (6th Cir. 1985) involved an assault on a prisoner in a county jail. The perpetrator was never identified but it was established that he was admitted to the plaintiff's cell by a deputy sheriff who unlocked the cell door with a key. The court viewed the use of the key as evidence of the participation of various shift personnel in the assault. In affirming a jury verdict against the county sheriff the court stated the real basis for the decision:

> "The sheriff's subsequent failure to order and direct an investigation which disclosed exactly who were the perpetrators of the brutal violations to the U.S. Constitution and to administer censure and punishment served to confirm the existence of an unstated "policy" of toleration of illegal brutality toward any county prisoner who had threatened the life of a sheriff's deputy".

There is obviously no factual parallel between *Marchese* and the present case.

II. Ohio Revised Code Sections 2744.02 and 2744.03 provide a city and its police chief with absolute immunity from state law wrongful death and survivorship claims arising from the shooting of a fleeing offender by a member of the police force.

In addition to the 1983 claim Petitioner has also attempted to plead a cause of action for wrongful death under Ohio Revised Code Section 2125.01 and a survivorship action under Revised Code Section 2305.21 for Smith's personal injuries and pain and suffering experienced prior to his death.

Revised Code Section 2744.02, effective November 20, 1985, provides the city with complete immunity from the state law claims:

> "(A)(1) For the purposes of this Chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in Division (B) of this Section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental....function."

Division B of the Section lists a number of exceptions where political subdivisions are liable but none remotely covers the circumstances of this case. Revised Code Section 2744.01 lists a number of "governmental functions" including:

> "The provision or non-provision of police, fire, emergency medical, ambulance, and rescue services or protection;"

Urseth v. Dayton, 653 F.Supp.1070 (S.D.Ohio 1986) held that the above quoted sections provided the city with complete immunity from liability for damages in a wrongful

death action arising from an excessive use of force by the police. The Court however declined to apply the statute since the incident occurred in 1983 prior to the effective date.

Chief Freland would have no liability to the petitioner on the merits of the case under state law since supervisory officials have no vicarious liability for the acts of their subordinates. He also is provided with immunity by Revised Code Section 2744.03 which provides in pertinent part as follows:

> "(VI) In addition to any immunity or defense referred to in Division (A)(7) of this Section and in circumstances not covered by that Division, the employee is immune from liability unless one of the following applies:
>
> (a) His acts were manifestly outside the scope of his employment or official responsibility;
> (b) His acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;
> (c) Liability is expressly imposed upon the employee by a section of the revised code."

Obviously none of the listed exceptions has any application to the activities of Chief Freland in this case.

Petitioner argued that Chapter 2744 immunity is not absolute, citing *E.J. v. Hamilton Count*, 707 F. Supp. 314 (S.D. Ohio 1989). E.J. claimed physical and sexual abuse while an inmate of a county juvenile home. Hamilton County was not claiming immunity under 2744.02. It was instead claiming immunity under Section 2744.03(A)(5) which provides immunity for discretionary acts unless the discretion was exercised with "malicious purpose, in bad faith, or in a wanton or reckless manner." The decision was made in the overruling of a motion to dismiss under Rule 12(b)(6). As we might expect, counsel had quoted the

statute in alleging that the actions of the policy maker were taken with "malicious purpose, in bad faith, or in a wanton or reckless manner." The county in that case could not claim immunity under Section 2744.02 because Section 2744.02(B)(4) contains an exception for injuries occurring "within or on the grounds of buildings that are used in connection with a performance of a governmental function."

Wallin v. Cincinnati Eye Bank, et al, 733 F. Supp. 1152 (S.D. Ohio 1990) was a suit against Hamilton County and the county coroner for damages arising out of the erroneous statement that corneas collected from plaintiff's decedent for transplant purposes contained the AIDS virus. The court held that Section 2744.02 provided absolute immunity for Hamilton County since a governmental function was involved and no exception applied. The coroner was likewise found to be immune under Section 2744.03 since none of the exceptions were applicable.

In *Rahn v. City of Whitehall*, 62 Ohio App. 3d 62 (Franklin Co. 1989) the plaintiff was injured when a fleeing motorist collided with her car. Plaintiff claimed the police department had negligently conducted a high speed chase of the offending motorist. The court held that the city was absolutely immune under Ohio Revised Code Section 2744.02.

Chief Freland is entitled to immunity under 2744.03(A)(6) since none of the exceptions (a), (b) or (c) are applicable. Unquestionably the chief was acting within the scope of his employment. The plaintiff has not alleged in the complaint that the chief's actions were "with malicious purpose, in bad faith, or in a wanton or reckless manner". Moreover the factual matters submitted to the court on this motion for summary judgment would refute any such allegation were it made. Finally there is no code section expressly imposing liability.

Petitioner has also argued that "The Ohio Supreme Court has also determined Chapter 2744 immunity to be qualified", citing 1946 *St. Clair Corporation v. Cleveland*, 49

Ohio St. 3d 33 (1990). This is a complete distortion of the holding in that case. The case was a Section 1983 action filed in state court and there were no state law claims alleged. The plaintiff, the owner of a bar, alleged that a Cleveland Police Officer had been intentionally harassing his customers by illegally ticketing and towing their cars. He claimed that his lost business constituted a deprivation of property without due process of law under Section 1983. The Supreme Court applied the well known principle that in 1983 cases alleging only a deprivation of a property interest the plaintiff must plead the absence of a state law remedy. The Supreme Court affirmed the dismissal holding that Revised Code Section 2744.03(A)(6) does provide a state law remedy against the individual police officer for his intentional torts. The court did not hold that this section provided any remedy against the city itself or the police chief nor did it consider the question of qualified versus absolute immunity. It will be remembered that the plaintiff does not even allege an intentional tort on the part of Chief Freland.

Constitutional questions regarding immunity statutes were long ago disposed of in *Krause v. State of Ohio*, 31 Ohio St. 2d 132 (1972). While this holding predates Chapter 2744 it upholds the principle that suits on state law claims may be brought against the state and its political subdivisions only as authorized by state law. To the knowledge of this writer no Federal Court has ever held that governmental immunity from state law claims violates any provision of the United States Constitution. Indeed plaintiff apparently has been unable to find such a case.

Petitioner has also argued that 2744.02 would violate federal principles of equal protection. Again this argument has absolutely no substance. The statute creates no suspect classifications among claimants. All claimants are treated alike in that no claimant has a cause of action against a municipal corporation growing out of the operations of a police department. In construing a prior immunity statute contained in Chapter 2743 of the Revised Code, the Court

of Appeals for Franklin County in *Frazier v. Alum Crest*, 48 Ohio App 2d 283 (1976) rejected the equal protection argument even though both statutes waived governmental immunity in one circumstance and not in another. The court concluded that:

> "The extent to which the state wishes to waive sovereign immunity is a matter for the state to determine. The fact that the state waived in some circumstances and not others does not constitute a denial of the equal protection of the law."

III. Where a Plaintiff petitions for a Writ of Certiorari to review a judgment in favor of all Defendants but argues error only as to one Defendant, Certiorari, if granted, should be limited to that Defendant.

The petition for certiorari argues only the claims against Officer Peter Schulcz and makes no mention of any error as to the judgment in favor of Chief James Freland or the City of Springdale. Under these circumstances the petitioner must be deemed to have waived any claim of error as against the Police Chief or the city and the petition should be denied as to these parties.

CONCLUSION

Petitioner conceded that there is no basis for a claim of failure to train against either Chief Freland or the city. Petitioner's sole remaining claim is that the city and Chief Freland created an "atmosphere of lawlessness" by condoning the excessive use of force. There is of course no evidence of a single prior incident and all of the available evidence indicated exactly the contrary. The sole fact upon which petitioner rests her case is the fact that Chief Freland, following a thorough investigation, came to a conclusion which differs from that of the petitioner. The decisions of the courts below demonstrate that the chief's conclusion was not unreasonable. As a matter of law this is insufficient to support a 1983 claim on these facts. Both the city and Chief Freland are immune from the state law

claims under Revised Code Sections 2744.02 and 2744.03 and petitioner has presented no authority to the contrary. All of the constitutional arguments as to Chapter 2744 have been previously disposed of by the Courts of Ohio. The City of Springdale and Chief James Freland were entitled to summary judgment and certiorari should be denied as to these respondents.

Respectfully submitted,

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